

## THE HIGH COURT

[2015 No. 4925 P.]

**BETWEEN**

**P. D.  
AND  
H. R.**

**PLAINTIFFS**

**AND  
D. D.**

**DEFENDANT****JUDGMENT of Mr. Justice Allen delivered on the 25th day of February, 2020**

1. J. D. died on 9th July, 2005. He was survived by his wife, H., and five children, son 1, daughter 1, son 2, daughter 2, and son 3. By his will made on 23rd May, 2005 J. D. appointed his step-brother D. B. as his executor. He devised his house on four acres and household chattels to H., for her life, *dum sola*, with a right of maintenance and support from the balance of the farm. H. was 80 years of age at the time J. made his will.
2. J. devised part of the farm, comprising about 50 acres, to H. and son 2, jointly; another part, comprising about 40 acres, to daughter 1, daughter 2 and son 1; and the balance of 240 acres or so, the house and four acres after the death of H., all of his stock and farm machinery, and all of his entitlements under the single payment scheme, to son 3. He left the remainder of his estate to H.
3. No estate account was ever prepared.
4. Very soon after J.'s death, D. B. renounced. While the evidence is rather vague, it appears that in the years following J.'s death son 2 kept horses on the 40 acres and son 3 farmed the balance of the lands.
5. By notice given on 16th August, 2015 H. elected to take her legal right share and soon after purportedly appropriated the family home and 108 acres in three identified plots in satisfaction of that share. There is no issue as to the validity of the election. It does not appear to have been ever formally agreed, but it does not appear to be contested, that the appropriation was ineffective. Firstly, the purported appropriation went beyond the dwelling, and secondly, the dwelling was held with agricultural land which formed part of J.'s estate, and no court application was made pursuant to s. 56(5)(b) of the Succession Act, 1965.
6. There is no distribution account or draft distribution account for J.'s estate to show the effect of H.'s election on the entitlements of the beneficiaries of J.'s estate.
7. H. died on 25th July, 2008. By her will, which was also made on 16th August, 2005 H. appointed son 2 her executor, and devised, or purported to devise, the house and contents and the surrounding four acres to her five children in equal shares, and the residue of her estate to son 2.

8. No estate account was ever prepared for H.'s estate, either. There is no draft distribution account showing the effect of the invalidity of the notice of appropriation on the purported devise of the house and surrounding four acres on the distribution of H.'s estate: but if the appropriation was invalid, the devise failed, and son 2, as the residuary legatee, took the entire estate.
9. On 5th October, 2010 son 2 proved H.'s will. The grant of probate shows a gross estate of €891,471, and a net value of €885,971. There must have been an inland revenue affidavit sworn but it was not produced on the application before me.
10. On 5th May, 2011 a grant of letters of administration with will annexed of the estate of J. was granted to son 2. It was said that there was a court application at or about that time but at the hearing before me no details were given, save that son 3 was said to have an order for costs which had not been paid.
11. On 27th September, 2011 son 1 made an application to the High Court under s. 117 of the Succession Act, 1965 for a declaration that J. had failed in his moral duty to make proper provision for him, and for such provision from J.'s estate as to the court should seem just.
12. On his application, son 1 put a value of €3.1million on the farm. He exhibited a revenue certificate dated 17th July, 2008, based on an affidavit sworn by H. on 29th February, 2008, which put a gross value of €3,279,000 on J.'s estate, and a net value of €3,257,880. That affidavit suggested that J.'s estate comprised the farm, valued as of the date of death at €3,194,000, and farming assets of €85,000, and nothing else. It showed five debtors amounting in total to a little over €20,000. The largest creditor of J.'s estate was a co-operative society, which was shown to be owed €15,448.87. That, debt it appears, has never been paid.
13. The s. 117 proceedings meandered through the High Court. There was an exchange of affidavits in 2012 and an exchange of discovery in 2014 and the matter was listed for hearing on 9th December, 2014.
14. On the day before the case was to be heard, son 3's solicitors served on son 2's solicitors and son 1's solicitors a form of notice of motion dated 8th December, 2014 and purportedly returnable for the following morning, seeking an order joining son 3 as a notice party. That motion was never issued, and son 3 was never joined as a notice party, but he instructed his solicitors and counsel to attend on 9th September, 2014 as they had from time to time previously when the proceedings were listed for mention. With the agreement of son 3, daughter 2, and daughter 1, and son 2 in his representative and personal capacities, son 1's claim was settled for €150,000 in addition to his *"distributive share of the net value of the lands conferred on him jointly with his sisters ... plus a one fifth share of the net value of the dwelling house and four acres appropriated by his mother towards satisfaction of her legal right share"* and agreed costs of €82,500.

15. I pause here to observe that the difficulty with the appropriation by H. does not at that time appear to have been identified. The settlement with son 1 created or confirmed at least an expectation on his behalf that he would have – in addition to his money – his one third share of the 40 acres devised by J., which would have to abate by reason of H.'s election, and one fifth of the value of the house and four acres, which by reason of the invalidity of the purported appropriation was never part of H.'s estate. Son 3 and son 2 on the application now before the court have identified eleven issues to be determined. That list of issues does not include any issue as to the effect on the administration of either estate of the agreement made with son 1.
16. The settlement of the s. 117 proceedings provided that son 2 would have his costs from the estate, to be taxed in default of agreement *"on the executor's scale"* and that:-

*"... it is a matter for the court to decide whether or not the legal representatives of [son 3], [daughter 1] and [daughter 2] ([daughter 2] to confirm whether or not intends (sic.) to take legal advice) are entitled to costs from the estate."*
17. The settlement provided that son 1 should have his money and other entitlements by 8th December, 2015.
18. As far as can be seen, the settlement of the s. 117 proceedings was not finalised on 9th December, 2014 and no order was ever made for the taxation of the administrator's costs. Nor, until now, was any application ever made for the costs now claimed by son 3. The s. 117 proceedings were adjourned for mention until 22nd January, 2015 and thereafter from time to time throughout 2015.
19. By plenary summons issued on 17th June, 2015 son 3 and daughter 2 issued proceedings against son 2 claiming an order revoking the grant of letters of administration in the estate of J.; an order appointing an independent administrator; an order directing son 2 to account for the assets of the estate; a declaration that the purported election and appropriation by H. were void - not because they were not permitted by the Succession Act but on the grounds of incapacity and/or had been procured by undue influence; a declaration that H.'s will was void on the grounds of incapacity and undue influence; an order for the administration of J.'s and H.'s estates by the court; damages, and costs.
20. On 13th October, 2015 an appearance was entered on behalf of son 2 in the plenary proceedings. The notice of entry of appearance called for delivery of a statement of claim, but that was never done. Instead, son 3 issued a motion on 24th September, 2015 for the revocation of the grant in the estate of J.; an order appointing an independent administrator; an order for an account; and an order directing son 2 to comply with the settlement agreement of the s. 117 proceedings.
21. It is not useful to dwell on the detail of all of son 3's complaints but one of them was that between 2011 and 2015 son 2's solicitors had collected a total of €299,222.68 for a Bord Gais wayleave and single farm payments, and had paid out a total of €99,454.46 - of which €91,233 of was in respect of their own fees. Most of these fees appears to have

been related to the defence of the s. 117 proceedings but there was no suggestion that these had been agreed.

22. Son 3's motion in the plenary proceedings was countered by a motion issued on behalf of son 2 on 27th November, 2015 to strike out some of the reliefs claimed by the plenary summons on the grounds that they were frivolous and vexatious and bound to fail.

23. The two motions in the plenary proceedings and the s. 117 proceedings came into the list together before Binchy J. on 17th December, 2015 and, by consent were referred to mediation.

24. On 26th January, 2016 after a long day in mediation, an agreement was signed by son 2, son 3 and daughter 2. The first paragraph of the settlement agreement provided that: -

*"It is agreed that these proceedings and all matters arising from the administration of the estates of [J. D.] and [H. D.] shall be resolved on the following terms".*

25. It was agreed that the land, stock and machinery would be sold and *"the proceeds of sale distributed as set out in this agreement"*.

26. It was agreed that two estate agents, one nominated by each side, would be jointly appointed auctioneers *"with joint carriage of sale"* and that they should decide the reserve price, the time and mode of sale, the necessary state and condition of the land for the purposes of achieving the best price, whether the land should be sold with vacant possession, and whether the single farm payment should be included in the sale of the lands.

27. It was agreed that the sale proceeds would be used to pay the costs of sale, the debts of the estates, the income tax of the estates, the inheritance tax of the beneficiaries, the administration costs, and the s. 117 payment and agreed costs to son 1: and that the balance of the money would be lodged in a joint deposit account in the joint names of the solicitors.

28. The settlement agreement went on to provide that: -

*"The parties hereto shall agree how the net balance is to be divided, which said settlement shall be ruled by the court and in default of agreement determined by the court."*

29. The settlement agreement of 26th January, 2016 provided that the parties' accountants would forthwith agree and submit income tax returns for the years 2004 to 2015 and inheritance tax returns for the beneficiaries; that son 3 would be paid €250,000 *"in recognition of his contribution in maintaining the farm (from the single farm payment) to be paid after the sale of the property"*; and that the legal right share of H. would be calculated on the basis of one third of J.'s net estate before deduction was made of the €150,000 to son 1. It did not specifically provide that in the calculation of H.'s legal right

share, no deduction should be made in respect of the costs payable to son 1 – from J.'s estate – or the costs of defending those proceedings, which were also for J.'s estate.

30. The settlement agreement provided that it would be made a rule of court; that there would be liberty to apply; and that the parties would bear their own legal costs of the mediation and of the proceedings to date.
31. I pause here to observe that it was impossible for the accountants to have agreed or made inheritance tax returns, or for the inheritance tax to have been paid, unless and until the benefits to which the beneficiaries were entitled had been ascertained. Moreover, it is difficult to see the benefit to son 3 of the payment of €250,000 from the single farm payment, which had been specifically devised to him by the will.
32. I suppose that the agreement that the farm would be sold represented some progress but the issue as to the entitlement of the various beneficiaries in each of the estates was kicked down the road.
33. The two cases were listed for mention together before Gilligan J. on 26th April, 2016 when the January, 2016 settlement agreement was received and filed and made a rule of court. The order then made provides that each of the parties should bear their own costs, and that there should be no order as to the costs to date, and that there was liberty to apply. The order of Gilligan J. – which was made in the plenary proceedings - recites that the s. 117 proceedings were then before the court, but the settlement of those proceedings was not received or filed, nor was any application made in respect of the costs of those proceedings. The proceedings were adjourned, together, for mention until 5th July, 2016.
34. In the meantime, on or about 5th February, 2016 the two auctioneers visited the lands together and in an e-mail of that date made a number of recommendations to ensure that the farm would be in the best possible condition for sale, including the removal of all machinery and scrap and livestock and bloodstock, and the application of fertiliser to improve the colour and appearance of the grassland. The most urgent matters were said to be the removal of bloodstock and scrap metal and machinery.
35. By e-mail of 15th February, 2016 the accountants working on both estates asked the solicitors for various documents said to be necessary to deal with the capital acquisition tax returns, which documents were promptly made available. In a further e-mail of 24th February, 2016 the accountants – inevitably – wanted to know how the net balance was to be divided because they could not otherwise deal with the inheritance tax returns.
36. There was protracted correspondence between the solicitors by which son 3 sought extensive financial information and complained that son 2 had not removed his horses and scrap metal.
37. On 30th June, 2016 son 3 filed a long affidavit exhibiting all the correspondence. He exhibited the auctioneers' recommendations, which in the narrative of his affidavit were

said to have been that the bloodstock, i.e. son 2's horses, should be taken off the land to ensure sufficient growth of grass. That is not what the advice was. Quite clearly, the recommendation was that all livestock, i.e. son 3's cattle, as well as all bloodstock, i.e. son 2's horses, should be removed. The removal of the horses, machinery and scrap was identified as the most urgent matter to be attended to but the recommendation that the livestock be removed was unequivocal.

38. After a number of listings for mention in July, 2016, at which son 3 was agitating for a date for hearing of an application for an order directing son 2 to do so, son 2 vacated the lands and the matter was adjourned for mention until 13th October, 2016. What happened to the motions thereafter is unclear.
39. On 31st January, 2017 a further motion was issued on behalf of son 3 in the plenary proceedings seeking liberty to re-enter the matter pursuant to the settlement agreement of 26th January, 2016 and seeking the same reliefs as had been sought by the motion issued on 24th September, 2015 - revoking the grant to son 2 in the estate of J., appointing an independent administrator, and so on.
40. On 2nd February, 2017 Gilligan J., noting an undertaking to do so, ordered that son 2 furnish a draft estate account by 5.00 p.m. on Friday 10th February, 2017, and adjourned the motion for mention.
41. On 23rd February, 2017 son 3 filed a further long affidavit, called Supplemental Affidavit No. 3, in which he complained bitterly at the lack of progress and information. He exhibited what he described as a two page account which was furnished by son 2's solicitors in purported compliance with the order of Gilligan J. of 2nd February, 2017. The first page lists five heads of income to date, amounting in total to €342,216.10 – without any dates or breakdown; six items of "*funds and assets to be realised*", three of which are not quantified; and a figure of €2.2 million for "*estimated net proceeds of sale of the farm*".
42. The second page lists three items of expenditure to date and fourteen "*outstanding liabilities and claims to date*". The expenditure to date includes €200,000 for the settlement of the s. 117 proceedings, which is less than the total payable to son 1, and no provision is made for the balance. It also includes €118,695 for the legal fees of son 2's solicitor, without any indication as to the work to which these payments related. The list of outstanding liabilities and claims to date does not indicate which are accepted and which are contested. Included is a sum of €111,782.46 for son 3's solicitors' fees and a further global sum of €306,070,13 for son 2's solicitors' fees "*estimated to date and into the future*". By the way, son 3's solicitors' claim for fees is in fact for €64,178.55 and there is no clue as to where the figure of €111,782.46 came from.
43. There was no attempt to separate the estates.
44. By February, 2017 farm accounts had been drafted for 2004 to 2015 and, I think, a calculation made of the tax liabilities on the premise that the farm was being farmed by

J.'s estate. The list of outstanding liabilities to which I have referred included a sum of €195,387.22 for income tax but there was no reference to the income on which that tax arose, or how much, if any, of that income should be appropriated to H.'s estate. Provision was made in the list of outstanding liabilities for €250,000 in respect of son 3's "wages" - which was part of the January, 2016 settlement - but as far as I can see this had already been included in the farm accounts, spread over a number of years.

45. In his Supplemental Affidavit No. 3, son 3 complained - quite rightly - that the figures on the two page account had not been broken down or vouched or separated between J.'s estate and H.'s estate. Son 3 called for a breakdown of the €118,695 paid to son 2's solicitor but did not specifically complain that the costs of son 1's s. 117 proceedings had neither been taxed nor agreed. While son 3 complained about the delay in progressing the administrations, there was no real suggestion as to how they might have been or ought to be progressed.
46. On 24th October, 2017 senior counsel instructed on behalf of the estates wrote an opinion on the distribution of the estates. He offered his opinion on the legal effect of H.'s election to take her legal right share on the gifts to her in J.'s will; the legal effect of that election on the other gifts in J.'s will; the invalidity of the purported appropriation by H.; and the legal effect of the invalidity of the purported appropriation on the gifts in H.'s will.
47. The farm had eventually been sold and the sale of completed on 4th August, 2017 at the price - before costs of sale - of €2,380,000. On 20th October, 2017 the valuer instructed on behalf of the estate had provided a breakdown of the total gross price, by reference to six parcels - the house, the four acres, the forty acres, the fifty acres, and the balance. Interestingly, the house was valued separately from the four acres, giving a combined value of about €126,000, compared to the €400,000 ascribed to the house on four acres by a valuation by the same valuer dated 14th July, 2006. While it is true that the date of death valuation of the entire farm (at about €3.2 million) was a good deal higher than the price ultimately achieved, the value ascribed to the house and four acres was proportionately a great deal less.
48. Senior counsel, having said what he said about the two estates, then undertook what he said was a pro-rata assessment on a percentage basis of the beneficiaries' interests in the total gross sale proceeds of the farm and came up with 76.12% for son 3, 11.34% for son 2, and 4.18% for of each of daughter 2, daughter 1, and son 1.
49. With respect, I am unconvinced that this was a useful exercise. It is certainly not transparent. It leaves out of account, as counsel's opinion spells out, the value of the stock and machinery, but it also leaves out of account the substantial receipts in respect of the Bord Gais wayleave and (apart from a figure of €58,379 included in the proceeds of sale of the farm) single farm payments and the income derived from the farm in the twelve years between the date of J.'s death and the sale of the farm. Critically, in my view, the exercise leaves out of account H.'s legal right share of one-third.

50. Son 3's motion of 31st January, 2017 came on for hearing before McDonald J. on 25th April, 2018. The order of Gilligan J. made on 2nd February, 2017 shows that there had then been no objection to the re-entry of the proceedings and that Gilligan J. ordered that the motion do stand listed for hearing. Thereafter further affidavits had been filed on each side, but the parties apparently spent the whole day before McDonald J. arguing about whether the proceedings (which had been re-entered by Gilligan J. fifteen months earlier) should or should not be re-entered.
51. McDonald J. gave liberty to son 3 and daughter 2 to re-enter the proceedings and directed the delivery of points of claim and points of defence. Both sides ignored the order of the court and instead eventually agreed an issue paper which set out eleven issues for determination by the court, without any indication of the facts – agreed or contested – said to give rise to those issues.
52. On 15th May, 2019 Reynolds J. gave directions for the delivery of an issue paper and reply, and the exchange of written submissions. Those directions were also ignored. At the hearing before me counsel for son 3 produced a summary of general principles of law comprising in the main quotations from cases and text books, which made no meaningful attempt to tie the principles to the administration of the two estates.
53. After the issue paper had been agreed, son 2's solicitor put the ball in for the hearing of the agreed issues by swearing a short affidavit exhibiting the January, 2016 settlement agreement and counsel's opinion. Son 3's solicitor countered with a fairly short affidavit summarising the history of the litigation and exhibiting a 132-page bundle of e-mails, letters and documents, by reference to which, it was suggested, the court could consider in full the efforts of son 3 to force son 2 to advance the distribution of the estate.
54. Not to be outdone, son 2's solicitor swore another affidavit exhibiting a 130-page bundle of correspondence and e-mails with the declared object of rebutting some, but not all of the averments in son 3's solicitor's affidavit – which were not identified - which were said to be substantially untrue and inaccurate. I listened as patiently as I could for two days as counsel dipped in and out of the correspondence, reopening old wounds, in the hope of convincing the court that the other side was responsible for the extravagant legal bills.
55. Each side submitted that the other has acted unreasonably and has impeded the administration of the estates. I accept the submission of both sides.
56. The joint recommendation of the auctioneers was that the best time to sell the farm was in the spring. It may or may not have been ambitious at the time of the mediated agreement on 26th January, 2016 to have hoped for a sale in the spring of 2016 but for a number of reasons it did not happen.
57. Following the recommendation of the auctioneers on 5th February, 2016 that the land be cleared of livestock, bloodstock and scrap, neither son 3 nor son 2 complied. At the end of July, 2016 there were numerous court applications directed to getting son 2's horses and scrap off the land. As far as I can see, no allowance was then made for the fact that



son 2 had had a health scare. Neither does it appear to have been recognised that the window for the sale of the farm had long since closed.

58. The agreement in January, 2016 was that the stock and machinery, as well as the land, would be sold. The stock and machinery were not sold but rather were taken off the land by son 3. Until the afternoon of the second day of the hearing before me, son 2 and his lawyers were labouring under the impression that the cattle had been sold, and son 2 was demanding that son 3 should account for the proceeds of sale. It is not entirely clear to me that son 3 was responsible for creating this misunderstanding, but it is quite clear that he knew that son 2's solicitors were labouring under a misapprehension and did nothing to dispel it. The truth only came out in answer to a question asked by the court. What happened was that the cattle were valued and taken away by son 3 to a rented farm. What happened to them thereafter is not clear.
59. On 23rd August, 2016 son 3 obtained a document called "*quotation of cattle priced*" from a cattle dealer, which valued the herd of 229 beasts at a total of €105,240. The date of the valuation shows that the cattle were removed from the farm a month after son 2's horses and scrap had been removed.
60. The valuation put a price or value of €750 on each of 100 cows, €350 on each of 25 heifers, and so forth. There was a general complaint on son 2's side that the animals had not been sold in the market but there was no evidence, or even suggestion, that the way to sell a herd is at the market rather than off the farm, or that the prices or values put on the animals by the valuation were low.
61. What son 3 did with the stock was in clear breach of the agreement and it was underhand, but son 2's focus was on the impropriety of son 3's conduct, rather than the consequences for the administration.
62. What son 3 did with the herd, and what son 2 thought son 3 did with the herd, did give rise to a significant problem in finalising the 2016 farm accounts. The cattle were gone, but there was no money. Even if the valuation were accepted, the estate has since that time been out of pocket.
63. As to the farm accounts, son 2 complains that son 3 delayed unreasonably in providing the accountants with information and documents which they required, and son 3 complains that son 2 has delayed unreasonably in signing the accounts when they were ready. But there was no evidence as to what information or documents, precisely, son 3 delayed in providing, or when he was first asked to provide them. Nor was there any evidence as to when son 2 was first asked to sign the accounts.
64. Each complains that the other, by his delay, had increased the liability of the estate (or estates?) to penalties and interest but neither has attempted even a rough calculation of what those increased penalties and interest might have been. The only thing that was clear was that after the accounts and tax returns had been finalised, son 2 refused to sign

a revised account and return which would have reduced the amount of tax by €15,000. Son 2 was advised by his lawyers to sign the revised return but wilfully refused to do so.

65. There is a good deal more contested detail, but I have identified the main issues.
66. From all of this it can be seen that son 2 and son 3 have been trading blows – or perhaps more accurately swinging at each other – for upwards of ten years. Son 3 is entitled to the lion's share of J.'s estate. If son 2 is right about the purported appropriation by H., he is entitled to the entirety of H.'s estate, which is one third of J.'s estate. Son 2 and son 3 both seek to fix J.'s estate with the costs of their squabbling. As far as I can see, no consideration has been given to how this would impact on the interests of daughter 2, daughter 1 and son 1: beyond an assumption that their entitlements would abate rateably to pay for their brothers' protracted and extravagant battle. Daughter 2, in the meantime, has died without having seen a cent of her inheritance.
67. By the way, there are a number of outstanding claims by creditors of J.'s estate which although not contested, and probably included in the farm accounts, have still not been paid.
68. I come eventually to the eleven issues identified in the issue paper.

#### **First issue**

69. The first issue which the court is asked to decide is whether, having regard to the sale price achieved for the lands and the valuation of the intended gifts of portions of the lands sold, and subject to any adjustment in regard to the value of stock, machinery and other income and realisations not yet accounted for, the beneficiaries shares in the estates (*sic.*) are to be measured in accordance with Formula A, which is son 3 76.12%, son 2 11.34%, and each of daughter 2, daughter 1 and son 1 4.18%, or Formula B, 78.40%, 10.20%, and three times 3.8%.
70. The first problem with the issue as formulated is that the estates are not being administered separately. The second, I think, is that the issue as formulated seeks to isolate one only of many issues that will arise in connection with the distribution and, on its face, contemplates that the exercise might need to be revisited. Counsel's opinion correctly identifies that H.'s legal right share must be accounted for in priority to all of the gifts in J.'s will. To do that, it will be necessary to identify the valuation date. It is clear that there was a significant reduction in the value of the farm between the date of J.'s death and the date of H.'s election, and the date on which it was sold. Unless the valuation date for the legal right share is the date of distribution, there may be a significant impact on the other gifts.
71. Since J.'s will specifically devised and bequeathed all of his estate, all of the gifts in the will will have to abate. Counsel observes that the effect of the election was to accelerate the gift to son 3 of the house and four acres but does not appear to have addressed his mind to whether that will impact upon the abatement of the other devises. Counsel observes that the effect of the invalidity of the purported appropriation is that the devise

in H.'s will fails but does not appear to take account of the settlement with son 1 by which, rightly or wrongly, he appears to have been promised a one fifth share of the house and four acres.

72. While the parties agreed that the alternative to Formula A was Formula B, neither could explain the basis of Formula B. It appears to have been floated at a meeting along the way, but no one was able to identify any valuation on which it was based.
73. In his affidavit sworn on 17th July, 2019, son 2's solicitor put into the mix a document generated in the course of the mediation in January, 2016 which, by reference to different valuations of the parcels specifically devised by J., suggested a division of 76.9%, 11%, and three times 4.66%. There was no attempt to explain the difference in the value ascribed to each of the parcels in the 2016 exercise and the October, 2017 exercise.
74. Even if one or other of the formulae proposed would give an indicative assessment of the beneficiaries' interests in two thirds of J.'s estate, the exercise would have to be revisited to take account of the very significant sums received for Bord Gais wayleaves and single farm payments, the value of the stock and machinery taken away by son 3, and the income generated by the farm in the sixteen years between the date of J.'s death and the date on which the farm was sold.
75. In the distribution of J.'s estate it will eventually be necessary to ascribe a value to each of the parcels specifically devised by reference to the proceeds of sale of the lands, but I am not satisfied that this should be done in isolation, or on some sort of provisional basis.
76. In any event, there is simply no evidence by reference to which the court could resolve the issue as to which – if either – of the two proposed formulae are correct.
77. On 2nd February, 2017 Gilligan J. ordered son 2 to furnish a draft estate account. What was produced was unquestionably not a draft estate account and this was acknowledged by counsel. It is not even a cash account.
78. Counsel for son 2 agreed with the court that much of the difficulty and confusion would have been avoided if proper administration accounts had been prepared. When pressed by the court that draft distribution accounts for both estates should have been produced years ago, counsel argued that distribution accounts are not usually made up until the estate has been fully realised and all liabilities paid. It was suggested that the preparation of draft administration accounts was a counsel of perfection which might expect too much of a small firm of solicitors, as opposed to one of the big firms.
79. I am bound to say that in a case where the estates' solicitor is claiming hundreds of thousands of euros for his own fees, plus tens of thousands of euros for accountants' and valuers' fees, I do not consider it to be unreasonable to expect that the estates are administered properly. The standard of work that is to be expected is an objective standard of care and skill and is not to be measured by the size of the firm, or the individual competence of the solicitor dealing with the case.

80. In the hope that it might support the way in which the administrator's solicitors have approached their work, counsel referred to an article by Mr. Richard Hammond, solicitor, in the March, 2014 issue of the *Law Society Gazette*. Mr. Hammond was then the vice-chairman of the probate, administration and trusts committee of the Law Society.
81. The title of Mr. Hammond's article is "*Holding to account*" and the headline is "*The executor/administrator as the primary client and the residuary legatees/intestate beneficiaries are entitled to receive administration accounts*". The author explains very clearly and concisely the need for and purpose of administration accounts and how they allow the solicitor and the beneficiaries to understand the progress of the administration. He advises that it undoubtedly lessens the bookkeeping burden on the solicitor if the administration accounts are commenced when the inland revenue affidavit is completed and updated regularly as the matter progresses. Mr. Hammond then provides clear examples of an estate account, a cash account, and a distribution account.
82. I do not find in Mr. Hammond's valuable article any glimmer of support for the way in which these administrations have been approached. It may be that in a straightforward administration the distribution account can be left until the end, but in a protracted and difficult administration a draft account will allow any issues that arise to be immediately identified and addressed. It will also allow an assessment to be made of the practical consequences of the resolution of each issue, one way or the other.
83. There is absolutely no good reason why the preparation of the draft distribution account should be deferred until the estate has been fully realised. The eventual outcome may very well depend on the extent to which estimates are realised but, in the meantime, the draft accounts will provide a matrix by reference to which all those interested will be able to see the progress of the administration and estimate the likely outcome. In this case, draft accounts would have ensured that everyone knew where they were going before son 1's s. 117 application was settled.
84. The answer to the first issue is that the court is not satisfied that either of the suggested formulae is appropriate.

#### **Second issue**

85. The second issue is whether J.'s estate is liable for any personal legal costs incurred by son 3 in connection with son 1's s. 117 proceedings.
86. The simple answer to this is no. Son 3, by himself and his solicitors, kept a very close eye on the s. 117 proceedings and a full team of counsel was instructed to attend at the settlement negotiations between son 2's lawyers and son 1's lawyers. I know of no authority for the proposition that the court has jurisdiction to award costs to someone who was not party to proceedings. At the very last minute son 3 contemplated that he might apply to be made a party, but in the end did not.
87. In any event, it seems to me any claim by son 3 for costs incurred in connection with the s. 117 application was a matter arising from the administration of the estate of J., which

was compromised by the agreement of 26th January, 2016. The agreement carries the record number of the plenary proceedings but the order of Binchy J. of 17th December, 2015 which sent both cases to mediation and the order of Gilligan J. of 26th April, 2016 - when the settlement was received and filed - recites that the two cases, which had been sent away together, came back together.

88. The estate has offered to make an *ex gratia* payment of €5,000 to each of the beneficiaries in respect of advice taken by them in relation to the settlement of son 1's case and son 3 must content himself with that.
89. I noted earlier that son 2's solicitors have paid themselves €118,695 – at least – for their costs of son 1's proceedings and that they did so without agreement or taxation. That ought not to have been done. It may very well be that there was no objection to the amount of those costs but that is not the same as consent. The settlement with son 1, as I have said, provided that the defendant was to have his costs, but it is not apparent to me that an order was ever sought or made for the taxation of those costs in default of agreement. It may very well be said that for so long as son 3's solicitors were promoting a claim that they should be paid their costs, they were not entirely dispassionate in looking at the estate's solicitors' claim. The refusal of son 3's solicitors' claim for costs out of J.'s estate may encourage them to scrutinise more closely the estate's solicitors' claim.
90. In the meantime, the money which was taken from the estate account must be put back until the costs have been taxed or agreed.

#### **Third issue**

91. The third issue is whether the interest and penalties arising on the settlement of the revenue liabilities of the estate are expenses of the estate.
92. The answer to that is unquestionably yes. In fact it appears that in respect of the years 2005 – 2015 there was a surcharge for late filing of accounts of €5,696 and interest of €37,896, and no penalties.

#### **Fourth issue**

93. The fourth issue is whether the estate is entitled to set off as against any sums due from the estate to son 3 such interest and penalties on the revenue settlement as were incurred by reason of the alleged failure of son 3 to deliver papers and records of the estate to the estate accountants until September, 2013.
94. As I have observed, the issue is inchoate without an indication of the date on which son 3 was asked to deliver those papers and records and when they were in fact delivered. In any event there is no evidence of the date of any request.
95. What appears to have happened here – and elsewhere – is that a draft issue premised on a bald general assertion of delay was modified by the insertion of the word "*alleged*", rather than reframed as a claim that there was a demand at a specified time for the

delivery of specified papers and records, a failure to comply with it, and a quantified alleged contribution of such delay to the interest and penalties.

#### **Fifth issue**

96. The fifth issue is whether the administrator is to be held personally liable for any interest or penalty charges incurred by the estate on the revenue liability as a result of his alleged unreasonable refusal to sign, in a timely manner, the farm accounts as prepared by the estate accountants.
97. Again, there is no indication in the issue, or the evidence, of the time at which son 2 was asked to sign the accounts, or what time he might reasonably have taken to do so.
98. The point is also made by son 2 that any issues as to the delay and the preparation and signing of the estate accounts prior to 26th January, 2016 were compromised by the settlement signed by the parties. Rather than nailing his colours to the mast of the settlement, however, son 2 got his retaliation in first by reviving or introducing an allegation of delay on the part of son 3 in facilitating the preparation of the accounts which, he, son 2, delayed in signing.

#### **Sixth issue**

99. The sixth issue is whether son 2 should be held personally liable for the alleged costs incurred by son 3 in allegedly advancing the distribution of the estate of J., including but not limited to all re-entry proceedings before the High Court. In practical terms, son 3 wants son 2 to personally pay the costs of these proceedings: which he has not yet secured.
100. The agreement of 26th January, 2016 provided that the parties would bear their own costs of the mediation and of the proceedings to that date, and that is reflected in the order made by Gilligan J. on 26th April, 2016.
101. The premise of this issue is that the later court applications were necessary and effective to advance the distribution: but the demonstrable fact of the matter is that the distribution is no further on.
102. The costs incurred by son 3 in 2016 in seeking to compel son 2 to get his horses and scrap off the land were incurred at a time when there was no immediate prospect of the lands being offered for sale and at a time when son 3 still had a substantial herd of cattle on the land. Taking into account the manner in which the cattle were taken off the land in August, 2016 in my view there should be no order as to the costs of those applications.
103. If I were to look at the costs of the application and order of 2nd February, 2017 when the order was made for the estate account, in isolation, I would have allowed those costs to son 3 but then would have had to consider the costs implications of the fact that son 3's claim for costs in connection with son 1's application has failed. I am satisfied that justice can be done by making no order on either application.

104. The costs of the hearing before McDonald J. on 25th April, 2018 appear to me to have been entirely wasted. So much of son 3's motion issued on 31st January, 2017 as sought liberty to re-enter the proceedings had been dealt with by Gilligan J. on 2nd February, 2017 and the order then made clearly showed that the proceedings had been re-entered. As to the substance of the dispute, McDonald J. directed an exchange of pleadings which, if they had been delivered, would have brought some focus to a very diffuse dispute, but the parties ignored the order and formulated a list of issues without identifying how they arose and without providing the court with the evidence that would have been necessary to have decided many of them.
105. Similarly, the costs of the hearing before Reynolds J. on 15th May, 2019 do not appear to me to have been usefully incurred. Rather than following the four directions given by the court, the parties agreed a list of mostly hopelessly vague issues and they did not, as directed, exchange submissions before applying for a hearing date.

#### **Seventh issue**

106. The seventh issue is whether the estate has no liability to son 3 in respect of his legal costs in any matter other than those agreed of 26th January, 2016.
107. That issue, it seems to me, overlaps with the issue as to whether son 3 should have the costs he incurred in supervising son 1's claim and whether he should have the costs of any or all of the court applications in the plenary proceedings.

#### **Eighth issue**

108. The eighth issue is whether son 2 should provide the information as requested by the estate accountants regarding the finalisation of the 2016/2017 accounts.
109. The issue as formulated is extremely vague but it seems to be ultimately directed to the removal by son 3 from the farm of the stock and machinery in August, 2016. In practical terms, son 3 is complaining that son 2 has failed to provide the accountants with information which he, son 3, has failed to provide to son 2. Moreover, the information requested by the estate accountants – which was for an account of the proceeds of sale of the animals – is overtaken by son 3's belated confession that the animals were not sold but were taken away.
110. The answer is that son 3 is accountable to the estate for the value of the stock and machinery which he removed from the land. If son 3 cannot justify the valuation he now relies on, the value can be determined by applying the rule in *Armory v. Delamirie* (1722) 1 Strange 505.

#### **Ninth issue**

111. The ninth issue is whether the administrator's solicitor should provide full estate accounts to the plaintiffs in respect of the estates of J. D. and H. D.
112. I cannot understand how this might conceivably be in issue. If it is not in issue, I cannot understand how it might have found its way onto the issue paper. The defendant, as the administrator of both estates, is accountable to the beneficiaries of each estate. The

plaintiffs, as beneficiaries under both wills, are entitled to accounts. Son 2's solicitor has deposed that he is "*ready, willing and able*" to furnish the accounts - without saying when.

113. That, it seems to me, is the key to moving this administration on and there will be an order directing the preparation, in each estate, of a draft estate account, a draft cash account, and a draft distribution account.

#### **Tenth issue**

114. The tenth issue is whether son 2 as administrator is responsible for any interest that may have accrued on any outstanding debts owed by the estate of J. D.
115. The evidence is hopelessly vague. It is acknowledged that there are outstanding liabilities which have not been paid. It is suggested that son 2's solicitor is engaged in ongoing negotiations with the creditors who – with abundant justification – have been agitating claims for interest with a view to getting their long overdue accounts paid. The position appears to be that these creditors are not insisting on interest if only their accounts are paid.
116. Whether or not there are unresolved claims for interest, the admitted liabilities must be paid, and the estate is not to be burdened with a claim for costs in respect of any protracted and futile and wholly unnecessary negotiations with creditors.

#### **Eleventh issue**

117. The eleventh issue is whether son 3 is obliged to properly and fully account to the estate in verifiable manner in respect of the sale of stock, farm machinery and fodder.
118. The answer to this is that son 3 is accountable to the estate for the full value of the stock and machinery and the value of any fodder removed by him from the farm, but the evidence put before the court is hopeless inadequate to allow any assessment to be made of the extent of that liability.

#### **Orders**

119. There will be an order directing son 2 to exhibit a true, full and perfect inventory and account of the estates of each of J. D. and H.D.
120. There will be an order that son 3 is not entitled to be paid any costs incurred by him in connection with the s. 117 application of son 1 against the estate of J. D.
121. The costs of these proceedings up to and including 26th April, 2016 were dealt with by the order of Gilligan J. of that date.
122. There will be no order as to the costs reserved by the orders of Gilligan J. of 2nd February, 2017, McDonald J. made on 25th April, 2018, or Reynolds J. made on 15th May, 2019.



123. There will be an order that neither party to these proceedings is entitled to be paid by the other, or to retain from the estate of J. D., any sum whatsoever in respect of any costs of or incidental to these proceedings.

124. There will be liberty to apply.